Supreme Court, U. S.
FILED
OCT 28 1975

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Supreme Court of the United States

October Term, 1975

No. 75-353

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR.

PAUL G. PENNOYER, JR.
ZACHARY SHIMER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

CHADBOURNE, PARKE, WHITESIDE
& WOLFF
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To the extent that Chris-Craft's Brief in Opposition even deals with the Piper individuals, it distorts the facts, wholly misstates their position and fails to address the legal issues raised in the Petition for Certiorari.* Chris-Craft, by rhetoric, tries to cloud the fact that important questions have been raised which require resolution by this Court.

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* Contrary to Chris-Craft's assertions (Brief, pp. 3, 14), the Piper individuals do not admit they violated Section 14(e) of the 1934 Act. Nor have they abandoned their positions with respect to Chris-Craft's lack of standing and the improper elimination of a requirement of scienter (Brief, pp. 19, 22). The Piper individuals concur with Bangor Punta's Petition but, in order to avoid needless repetition, do not believe it appropriate to reiterate those issues.

Causation

Chris-Craft's Brief ignores the improper standards of causation applied by the Court below. It pretends that the parties litigated and the courts below made findings of causation in fact, rather than making a series of unjustifiable presumptions (a word never mentioned by Chris-Craft) as the Court of Appeals did.

The essential causal connection between the Piper individuals' alleged misrepresentations in January and Chris-Craft's alleged injury when it lost the opportunity to gain control in September was never proven, litigated or even briefed. Nevertheless, the Piper individuals were held liable for the staggering judgment of $36 million, an amount not once mentioned in Chris-Craft's Brief.

By calling the issue of causation "a mathematical certainty" (Brief, p. 24) Chris-Craft attempts to convert a series of presumptions indulged in by the Court of Appeals into findings of fact.

Among the Court of Appeals' presumptions were that the Piper shareholders (1) relied on the alleged misrepresentations in the January communications and (2) presumably did not tender to Chris-Craft. Contrary to Chris-Craft's suggestion, the Piper individuals did not have "ample opportunity" to rebut those presumptions (Brief, p. 27, fn.). The issue was never litigated; in the trial court the Piper individuals established, and the trial court held, that there were no misrepresentations. When the Court of Appeals reversed, it rejected the obvious alternatives noted by this Court in *Blue Chip**—shareholders may not have tendered for reasons unrelated to the alleged misrepresentations—and presumed reliance without hearing or allowing any evidence in rebuttal.

Chris-Craft similarly misstates the Court of Appeals' standard of materiality as applied to the January com-

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* *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

munications (an issue raised in the *TSC* case recently accepted for review by this Court*). The Second Circuit did not find, as Chris-Craft argues, that the Piper shareholders "would" have regarded the alleged misstatements as material (Brief, p. 16), but rather presumed that (1) a reasonable shareholder *"would assume"* that calling the tender offer "inadequate" referred solely to price and not to the limited nature of the offer (A-38) and (2) not describing the so-called Grumman put *"was likely to affect* the attitude of Piper shareholders toward [Chris-Craft's] tender offer" (A-40) (emphasis supplied).

Chris-Craft also distorts the facts to support its presumed injury. It casually states it was seeking 300,000 "or more" shares on its tender offer, and goes so far as to imply that it would have purchased all shares in public hands (Brief, pp. 5, 6).** The trial court found that Chris-Craft could not have bought substantially more than the 300,000 shares it originally sought and actually purchased (A-113). The Court of Appeals did not make a finding that Chris-Craft would have bought more; it simply stated that "it appears" that the financing for the purchase of additional shares for cash in January "was available" and then made what it said was "a reasonable presumption" that in January Chris-Craft "was unlawfully denied the opportunity to purchase additional shares" (A-61-62).

In an effort to close the causal gap between the January and September events, Chris-Craft refers to the additional consideration to be received by all members of "the Piper family" in connection with Bangor Punta's exchange

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* *TSC Industries, Inc.* v. *Northway, Inc.*, cert. granted 44 U.S.L.W. 3180 (Oct. 6, 1975) (Docket No. 74-1471).

** Chris-Craft, which now suggests it would have purchased 900,000 shares for cash, made no effort to buy any additional shares after the tender offer closed (1340A). Indeed, Chris-Craft became concerned during the course of the tender offer since it was in no position to purchase more shares, that it might get the whole Piper company "dumped" in its lap (1335A).

offer.* Contrary to Chris-Craft's statement, the matter was not "concealed;" in fact, Chris-Craft stipulated in the trial court that the provisions for additional consideration were described in Bangor Punta's preliminary registration statement in May and its final Prospectus in July (426A, 428A-430A). More significantly, the Court of Appeals held that Chris-Craft was not injured as a result of alleged non-disclosure of the additional consideration provisions (a finding Chris-Craft buries in a footnote) (Brief, p. 8 fn.).

Hence, a central issue on causation, which Chris-Craft never addresses, is whether the court could properly *presume* for the first time on appeal that the January communications had a "continuing adverse effect" on Chris-Craft's later exchange offer for Piper shares (A-62)—a conclusion described by the dissenting judge in the Court of Appeals as a "fanciful assumption" amounting to "rank speculation" (A-115).

The Court of Appeals' decision on these issues puts it in conflict with other Courts of Appeal, a dispute requiring resolution by this Court.

Joint and Several Liability

In order to overcome its failure to prove any causal connection, Chris-Craft lumps the Piper individuals with the other defendants in an attempt to maximize their involvement. Referring to "petitioners" throughout its brief, Chris-Craft transparently ignores the undisputed fact that the Piper individuals did not participate in or have knowledge of any later alleged violations.

The legal authority cited by Chris-Craft fully supports the Piper individuals' position. Joint and several liability, as the quotation by Dean Prosser reveals (Brief, p. 28),

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* The Piper individuals and their wives owned only about 150,000 of the 501,090 shares owned by all members of "the Piper family." The additional consideration, which Chris-Craft implies has been paid (Brief, p. 30 fn.), was not, and is still the subject of continuing litigation with Bangor Punta.

is only appropriate when "two or more causes combine to produce . . . a single result, incapable of any logical division." Chris-Craft attempts to obfuscate the real issue, which is that the Piper individuals' alleged violations in January did not combine with any later volations to produce a single result—Chris-Craft could have purchased more shares after January if it was willing to pay cash for them. Hence, if there were any harm at all, it was clearly divisible.

Chris-Craft implies that management's resistance to Chris-Craft's takeover attempt, and seeking assistance from First Boston, Grumman and then Bangor Punta, was illegal (Brief, pp. 5, 7, 29). But even the Court of Appeals found "no fault in the Piper family's effort to avert through a Grumman merger what they concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt" (A-39). Management owed a duty to the shareholders, even under Section 14(e), to take such action. Indeed, it is undisputed that as a result of management's resistance the Piper shareholders were later offered higher prices for their shares by both Chris-Craft and Bangor Punta. Nevertheless, the Court of Appeals has penalized management by its $36 million damage award.

Chris-Craft's claim that the Piper individuals never pressed the propriety of joint and several liability below (Brief, p. 31) is simply false. The Piper individuals' petition for rehearing of the Court of Appeals' liability decision emphasized that the issues of both their personal and joint and several liability were never litigated, briefed or even argued and requested a remand so that appropriate findings could be made.

Damages

Contrary to Chris-Craft (Brief, p. 35), the Piper individuals challenge the newly devised standard of damages used by the Court of Appeals. Its quantum leap

from an award of $2 million, representing the trial court's computation under the mandate of the decrease in the value of Chris-Craft's Piper Aircraft holdings, to some $36 million under a newly devised formula, while Chris-Craft keeps its shares of Piper Aircraft stock is grossly improper.*

The application of a standard which makes management of a target company into insurers of the raider's normal market risks also warrants review by this court, particularly when the "damages" are computed as of one year after the alleged violations which presumably caused the injury.

CONCLUSION

For the reasons stated in the Petition and herein, a writ of certiorari should issue.

Respectfully submitted,

PAUL G. PENNOYER, JR.
ZACHARY SHIMER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

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* Chris-Craft avoids any acknowledgment that it still has its shares of Piper Aircraft stock, which clearly are worth more than the difference between its total purchase price, some $44 million, and the $36 million award. Its claim that it invested "$60 million in the contest, including carrying charges" (Brief, p. 4) is a gross distortion. The "carrying charges" include (a) interest paid on a $15 million loan arranged before the tender offer and drawn down in January in order to purchase the 300,000 shares, and (b) interest on subordinated debentures issued by Chris-Craft in 1968 before it began its purchases. Even the Court of Appeals refused to award these items as damages (B34-35).

Certificate of Service

I hereby certify that three copies of the foregoing Reply Brief for Petitioners were served by hand this 28th day of October on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: October 28, 1975

ZACHARY SHIMER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners